IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

THURSDAY, THE 7TH DECEMBER 2006 / 16TH AGRAHAYANA 1928

Crl.MC.No. 3957 of 2006()

CC.731/2005 of JUDL. MAGISTRATE OF FIRST CLASS COURT, KODUNGALLUR

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PETITIONER: ACCUSED

NISHAD, S/O.SUDHAKARAN,
KUTTASAN VEETTIL, NATTIKA P.O.,
NATTIKA VILLAGE, CHAVAKKAD TALUK,
THRISSUR DISTRICT.

BY ADV. SRI.RAJIT

RESPONDENTS: STATE AND COMPLAINANT

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1. ASHRAF, S/O.ABDUL RAHIMAN,
ARKAVEETTIL, KUTTAMUGAM, VATANAPPILLY VILLAGE,
THRISSUR DISTRICT.

2. NASSAR, S/O.MATTAPPURATH KUNJIKADAR,
EDAVILANGU VILLAGE, KODUNGALLUR TALUK,
THRISSUR DISTRICT.

3. STATE OF KERALA REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY P.P. SRI.K.A. AKBAR.

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 07/12/2006, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

CRL.M.C.NO. 3957 OF 2006

Dated this the 7th day of December, 2006

ORDER

The petitioner is the accused in a prosecution under Sec.138 of the N.I. Act. The prosecution against him is launched by the payee through his Power-of-Attorney. In the course of trial, the petitioner filed an application insisting that the payee must make himself available for examination on oath. That application under Sec.311 of the Cr.P.C. was dismissed by the learned Magistrate by the impugned order – a cryptic and short one, which reads as follows:

> "Petition is dismissed as the accused has no right to compel the presence of the complainant who is permitted to conduct the case through his Power-of-Attorney.

2. The learned counsel for the petitioner submits that the court below has not appreciated the width and amplitude of the powers which are available to the court under Sec.311 of the Cr.P.C. The learned counsel for the petitioner submits

that the decision in **Kamarudheen v. Shoukkathali** (2001 (3) K.L.T. 476) is not squarely applicable to the facts of this case and that a proper idea about the nature and scope of the powers under Sec.311 of the Cr.P.C. must be gathered from the decision of the Supreme Court in **Zahira v. State of Gujarat** (2006 (2) K.L.T. 350 (SC)).

3. It is for the litigant to decide what witness he must examine at which stage in support of his case. Normally, the discretion of the complainant - dominus litus, in a criminal prosecution must remain unfettered. Normally, the court or the accused will not have the power/right to insist that the complainant must prove his case by examination of any particular witness. Of course, the complainant runs the risk. If he does not examine himself and there is likelihood of a criticism that the best evidence has been deliberately suppressed and kept away from the court, he runs to the risk of adverse inference being drawn against him under Sec.114 of the Indian Evidence Act. It is for the petitioner/accused to bring out the circumstances which would show that it is necessary and essential that the complainant should/should have examined himself as a witness. He has made the position clear by already

filing the application. The complainant has not chosen to come to the box in spite of such application. I must assume that the complainant is taking the risk knowingly and advisedly. I agree with the court below that in every case normally and ordinarily the court would not compel the complainant to examine himself or any other particular witness. Nor can the accused dictate that the complainant must be personally examined in all cases. If such insistence were permitted, the option to the complainant to prefer a complaint through the Power-of-Attorney would be rendered meaningless as any recalcitrant indictee can frustrate the attempt of the complainant to conduct his case through the Power-of-Attorney/representative.

4. But this is certainly not so that the court has no power to enforce the presence of any witness including the complainant by invoking its powers under Sec.311 of the Cr.P.C. where the crucial consideration or `manthra' is only the interests of justice. In an appropriate case undoubtedly I would like to assert that the court has the power to direct even the complainant to appear before the court. But that would depend upon the facts and circumstances of each case. At the moment and with the available inputs, I am not persuaded to agree that the court

below has committed any error in not issuing such a direction.

5. Needless to say that at later stages of the trial if the court feels or the court is persuaded to feel on the materials available that such examination of the complainant is necessary, I carefully and cautiously observe that there is no want of jurisdiction for the court under Sec.311 of the Cr.P.C.

6. With the above observations, this Crl.M.C. is dismissed.

7. Hand over a copy of this order to the learned counsel for the petitioner.

Sd/-

(R. BASANT, JUDGE)

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//true copy//

P.S. to Judge